



REPUBLIC OF KENYA



**Syner Med Pharmaceuticals Limited v Super First Forwarders Ltd & another (Civil Appeal E054 of 2021) [2023] KEHC 22214 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 22214 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E054 OF 2021**

**F WANGARI, J**

**MAY 25, 2023**

**BETWEEN**

**SYNER MED PHARMACEUTICALS LIMITED ..... APPELLANT**

**AND**

**SUPER FIRST FORWARDERS LTD ..... 1<sup>ST</sup> RESPONDENT**

**MOMBASA CONTAINER TERMINALS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgement of the Learned Chief Magistrate Hon. E.K. Makori in Mombasa Chief Magistrate's Court Civil Suit No. 447 of 2016 delivered on 25th March, 2021)*

**JUDGMENT**

1. This is an Appeal against the judgement delivered by Hon EK Makori, Chief Magistrate (as he then was) in Mombasa CMCC No 447 of 2016 on March 25, 2021. The Appellant sued the Respondents herein for a sum of Kshs 10,085,098/=, interests at court rates from the time of filing suit until payment in full, costs of the suit plus 16% VAT herein and interest on VAT from the time of judgement until payment in full. The claim emanated from an alleged loss of pharmaceutical products while under the Respondents' custody.
2. The suit was strenuously defended by the Respondents. In a judgement delivered on March 25, 2021, the Trial Court found the Appellant's case not to have been proved and thus the same was dismissed with costs. Dissatisfied with the judgement, the Appellant lodged the present appeal wherein the trial court's judgement was faulted on ten (10) grounds contained in the memorandum of appeal dated April 16, 2021 and filed on the same day.
3. Directions were taken that the appeal be canvassed by way of written submissions. All parties duly complied with the court's directions by filing submissions and cited authorities in support of their rival positions.



4. I have duly considered the said submissions as well as the authorities cited by the parties. For the Appellant it was submitted that it had proved its case on a balance of probabilities on the weight of evidence on record and thus the Trial Court was in error to dismiss its case with costs. The Respondents submitted in favour of upholding the Trial Court's judgement.
5. This being the first appeal, it is my duty under section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co Ltd* (1968) EA 123; *Makube v Nyamiro* [1983] KLR 403 and *Kiruga v Kiruga & Another* [1988] KLR 348.
6. The Appellant called three (3) witnesses in support of its claim. PW1, Simon Laria, a Legal Officer with GA Insurance told the court the Appellant had been insured under policy number P2014-100-8021-80-A9099. On March 15, 2014, the Appellant reported that it had lost a consignment of the imported pharmaceutical goods which had been stored at Mombasa Container Terminal (MCT). They registered the report for purposes of the claim and an adjuster was appointed. The policy period was between 10/3/2014 and 5/9/2014. He produced several exhibits in support of the payments they made. On cross examination by counsel for the 1<sup>st</sup> Respondent, the witness stated that payment request vouchers are not cheques and that though there was a contract between the parties, he had not produced it. On cross examination by counsel for the 2<sup>nd</sup> Respondent, the witness stated a policy schedule is not an insurance policy. Before compensation there must be a policy and that the accident must happen within the life span of the policy. When referred to paragraph 6 of the plaint, the witness confirmed that it was talking of 2/3/2014. The report talked of 3/3/2014 and that the discovery of shortage was on 4/3/2014. He stated that the policy was not taken after loss.
7. PW2, Maliro Naomi Gachiri testified that the Appellant filed the suit to claim the amount paid under the subrogation rights. On cross examination, she stated that there was theft at the port on 24/2/2014 but Kenya Ports Authority was not one of the parties in the suit. PW3, Raphael Nguta Ojuendo stated that he was an insurance loss adjuster. He was appointed by GA Insurance when it was discovered that there was shortage in the cargo that was delivered. He was to find the source or cause of shortage and that is basically what he did. He stated that when the container was released at the Port of Mombasa, it was transferred to MCT where verification was done.
8. At MCT, it was discovered to have been in good and full condition. The seals were intact. When the cargo reached Nairobi, the seals were still intact. When opened, it was found to be half empty. Investigations on the weights were done and on tracking, the vehicle arrived to its destination within 48 hours which is average travel for commercial vehicles plying the route. On cross examination, he confirmed that when he went to MCT, the CCTV cameras were not working. He confirmed that it was the 1<sup>st</sup> Respondent who lodged the complaint and that the loss was at MCT. He stated that the place where the goods were lost is not clear but according to him, it appeared to have been at MCT. They did not find anything on the clearing agent.
9. The 1<sup>st</sup> Respondent called two witnesses, Jackson Muema and Peter Rubia while the 2<sup>nd</sup> Respondent called one witness, Edward Luka Muchemi. They all testified in favour of their positions that the goods were either lost at MCT or on transit.

### **Analysis and Determination**

10. I have considered the pleadings, the evidence tendered, submissions, cited authorities and the law and flowing from them, the following are the issues for determination: -



- a. Whether the Appellant proved its case to the required standard;
  - b. If the answer to (a) above, whether the Trial Magistrate erred in dismissing the Appellant's case;
  - c. What is the order as to costs?
11. On the first issue, it is trite that whoever alleges must prove. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:

“ 107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

12. The Appellant's claim against the Respondents was for a sum of Kshs 10,085,098/= being the value of goods lost while in the custody of the Respondents. The Appellant was required to prove that its goods were lost while in the hands of the Respondents or either of them. At paragraph 6 of the plaint dated December 8, 2015, the Appellant pleaded that it had an agreement with the Respondents. However, no such agreement was among the Appellant's documents. Be that as it may, the Respondents did not deny receiving the Appellant's goods. All the witnesses who testified confirmed that once the container was cleared from the Port of Mombasa, it was taken to the 2<sup>nd</sup> Respondent's premises where a verification exercise was undertaken and the goods in the container were confirmed to be full.
13. It is not denied that the 1<sup>st</sup> Respondent was the transporter who picked the container from the 2<sup>nd</sup> Respondent's premises and took it to its destination in Nairobi. Similarly, it is not in dispute that the container had 877 cartons but what was received was only 473 cartons meaning 404 cartons had been stolen or lost. To this end, I am satisfied that the Appellant proved that its goods were lost while in the custody of the Respondents. The next question is, who was to blame for the loss?
14. A review of the testimony tendered by the parties discloses a blame game between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent asserts that the goods were lost while at the 2<sup>nd</sup> Respondent's premises whereas the 2<sup>nd</sup> Respondent is of the view that the goods could have been lost while on transit. To this end, it is no longer a dispute of what was lost but rather, who was responsible for the loss. This is an interrogation that has to be undertaken to unearth whether any or all the Respondents were to blame. To apportion blame, the conduct of the parties would be key.
15. I note that when the 1<sup>st</sup> Respondent learnt of the loss, it took positive steps to find out how the goods were lost. It immediately instructed McLarens Young International to find out what transpired and the said McLarens prepared a detailed survey report which appears at pages 120 to 127. It equally issued a demand to the 2<sup>nd</sup> Respondent wherein it attached several documents among them Kenya National Highways Authority (KeNHA) weighbridge ticket. From the detailed McLarens survey report, theft of goods on transit was ruled out. Though McLarens were appointed by the 1<sup>st</sup> Respondent, I hold the view that its report is objective as it is not only prepared to favour the 1<sup>st</sup> Respondent but a useful



guide to the court which had the Trial Court considered the same, it would not have arrived at the conclusion it arrived.

16. The Trial Court left the Appellant with no remedy at all. The Court of Appeal in *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR held as follows; - “...This is a court of equity; equity shall suffer no wrong without a remedy...” From the report, the weight of the truck at Mariakani Weighbridge was 31,240 kilos while it was expected to weigh 38,319.365 kilos. The report concluded that any theft must have occurred before Mariakani thereby ruling out theft after Mariakani. From the GPRS records, it was found that the truck did not make any stopovers before Mariakani Weighbridge and thus logical conclusion points out to theft happening at the 2<sup>nd</sup> Respondent’s premises.
  17. The conduct of the 1<sup>st</sup> Respondent is one of a person who was interested to find out the truth of what really transpired. The same cannot be said of the 2<sup>nd</sup> Respondent. It is on record that it could not avail a CCTV extract of the place where the container had been kept in its premises. It is absurd for an entity of the 2<sup>nd</sup> Respondent’s standing to lack CCTVs or have CCTVs which are not operational while it is handling goods worth millions of shillings. If indeed the 2<sup>nd</sup> Respondent was desirous of absolving itself, nothing was hard than to avail the CCTV extract. It is on record that the 2<sup>nd</sup> Respondent had promised to provide the CCTV extracts to the 1<sup>st</sup> Respondent only for it to turn around and state that the CCTV DVR was non-operational. Why would the 2<sup>nd</sup> Respondent promise what it did not have? I safely conclude that the 2<sup>nd</sup> Respondent knew what had transpired and that was why it was not cooperating.
  18. Thus on the first issue, I find and hold that the Appellant proved its case to the required standard. It thus follows that the second issue is in the affirmative. The Trial Magistrate erred in dismissing the Appellant’s case with costs. Though the Trial Magistrate held that police assistance should have been sought, this did not preclude the Appellant from suing for its loss as it did. I am alive to the provisions of section 193A of the *Criminal Procedure Code*. It is true that one could not with exact certainty say at what point the goods were stolen but inference could be drawn from the conduct of the parties of who was culpable. In *CMAWM v PAWM* [2015] eKLR, the Court of Appeal held as follows; -

“...t is an established rule of evidence that where a party does not come clean in his evidence or is guilty of material non-disclosure, or on the whole his conduct is not above board, then adverse inference could be drawn against him...”
  19. In its submissions, the 2<sup>nd</sup> Respondent has delved on disparities on the documents produced but despite the said disparities, this did not change the fact that the Appellant lost its good and which goods were quantified. In the end, I find that the 2<sup>nd</sup> Respondent was to blame and I so hold. I thus proceed to set aside the Trial Court’s judgement delivered on March 25, 2021 and make the following orders: -
    - a. The appeal is merited and it is therefore allowed;
    - b. Judgement is entered in favour of the Appellant as against the 2<sup>nd</sup> Respondent as prayed in the plaint dated December 8, 2015.
    - c. Costs to the Appellant to be borne by the 2<sup>nd</sup> Respondent.
- It is so ordered.

**SIGNED, DATED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> DAY OF MAY, 2023.**

.....



**F. WANGARI**

**JUDGE**

**In the presence of: -**

N/A by the Appellant

N/A by the 1<sup>st</sup> Responden

N/A by the 2<sup>nd</sup> Respondent

Court Assistant - Guyo

